IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1501

DONALD WELDON IVEY, GORDON MAJOR PIRKLE, MARSHALL PYRON, JR., and CHARLES CLEON ANDERSON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OSCAR B. GOODMAN, ESQ.
Goodman and Snyder
230 Las Vegas Blvd. South
Las Vegas, Nevada 89101
Telephone: (702) 384-5563

Attorney for Petitioner:
CHARLES CLEON ANDERSON

H.A. STEPHENS, JR., ESQ.
CHARLES R. SMITH, ESQ.
Smith & Smith
2334 National Bank of
Georgia Building
34 Peachtree Street
Atlanta, Georgia 30303

Attorneys for Petitioners:
DONALD WELDON IVEY, GORDON MAJOR PIRKLE and MARSHALL PYRON, JR.

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

DONALD WELDON IVEY, GORDON MAJOR PIRKLE, MARSHALL PYRON, JR., and CHARLES CLEON ANDERSON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, DONALD WELDON IVEY, GORDON MAJOR PIRKLE, MARSHALL PYRON, JR., and CHARLES CLEON ANDERSON, respectfully pray that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 16, 1976.

OPINION BELOW

The opinion below was rendered on March 16, 1976, by the United States Court of Appeals for the Fifth Circuit. The opinion is unpublished and apparently will not be published. A copy of the opinion is attached hereto as Appendix "A".

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED FOR REVIEW

1. Whether 18 U.S.C. § 2518(1)(b)(iv) requires the identification in a wiretap application of all persons who the Government has probable cause to believe will participate in conversations over the telephone line to be intercepted, and whose conversations relate to the illegal activity for which the wiretap application is submitted; and if such identification is required, whether failure by the Government to so identify is grounds for suppression of the seized conversations.

STATUTES INVOLVED

18 U.S.C. § 2518. Procedure for interception of wire or oral communications.

(1) Each application for an order authorizing or approving the interception of a wire or oral communication *shall* be made in writing upon oath or affirmation to a judge of competent jurisdiction and *shall* state the applicant's authority to make such application. Each application *shall include* the following information:

* * *

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including . . . (iv) *the identity of the person, if known, committing the offense and whose communications are to be intercepted;*

* * *

(4) *Each order authorizing* or approving the interception of any wire or oral communication *shall* specify –

(a) *the identity of the person, if known, whose communications are to be intercepted;*

* * *

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that –

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval. (Emphasis Supplied)

STATEMENT OF THE CASE

Petitioners herein, together with eight (8) other co-defendants not herein involved, were indicted by a Federal Grand Jury sitting in the Northern District of Georgia, Atlanta Division, on May 21, 1974. The indictment charged Petitioners with violating 18 U.S.C. § 1955 and 371, illegal gambling business and conspiracy. Following entry of not guilty pleas, various motions were filed, including motions to suppress the results of a court-authorized wire interception which led to the indictment. Said motions were denied by the District Court. The Petitioners proceeded to trial by the Court without a jury, and all four Petitioners were found guilty of both counts of the indictment.

The order for wire interception in this case was issued upon an application filed by J. ROBERT SPARKS, Special Attorney for the United States Department of Justice; attached to and incorporated into Mr. SPARKS' application was an affidavit of a Special Agent of the Federal Bureau of Investigation containing factual allegations attempting to establish the requisite probable cause necessary to obtain the interception order. The application requested authorization to intercept wire communications of Petitioner PIRKLE and others as yet unknown. The order authorizing interceptions named only Petitioner PIRKLE and "other persons as yet unknown." Numerous conversations of three of the Petitioners were intercepted pursuant to this order and these intercepted communications were used during the trial (Petitioner ANDERSON was not overheard during these interceptions). Following the trial, convictions and sentencing, these Petitioners all appealed the judgments

to the United States Court of Appeals for the Fifth Circuit and that Court affirmed.

The threshold question of whether or not probable cause existed as to individuals other than Petitioner PIRKLE known to be committing the offenses for which interception was requested and ordered over the telephone subjected to the interceptions presents the issue herein clearly. The trial court found, and the Government conceded, that there was probable cause to believe that all four of these Petitioners had committed and were committing the offense for which the application for wire interception was submitted. The Court below ruled against Petitioners on whether the Government had probable cause to believe it would intercept conversations of Petitioners IVEY, PYRON and ANDERSON over the telephone for which interception was authorized.

Applying the standard of probable cause, a detached observer would clearly find the Government had probable cause to name Petitioners IVEY, PYRON and ANDERSON in its wiretap application.

The affidavit submitted in support of the application for wire interception clearly establishes probable cause to believe that these Petitioners were committing the offense; in fact, the application so states and the Government conceded this fact in its answer to the motion filed in the District Court. A careful reading of the affidavit for wire interception and the affidavit which was submitted in support of an earlier application for an order authorizing the use of a Pen Register also, it is submitted establishes probable cause to show that communications of these Petitioners would be intercepted. In the affidavit submitted in support of wire interception, there is listed certain

telephone numbers dialed from the phone to be intercepted (these facts were gathered by the use of a previous Pen Register which was authorized to be used on the phone by court order). This affidavit stated that one of the phone numbers dialed from the phone for which interception is requested is *known* to be used by Petitioner PYRON. This affidavit also contained a statement that Defendant PYRON advised confidential source number three that he, PYRON, is in "a key position in the numbers lottery business, which requires PYRON to make periodic contact with other members of this numbers lottery operation."

The affidavit submitted in support of an order authorizing the use of a Pen Register, which was incorporated and made a part of the affidavit for wire interception, stated that "a short time after the winning number is received at the 'bank', it is disseminated, *usually by telephone,* to other persons engaged in the numbers lottery." The affidavit in support of the Pen Register order also stated that this "lottery operation is conducted principally by telephone," according to the Federal Bureau of Investigation informants. The Pen Register affidavit stated that the "telephonic activity of the 'bank' and 'relay stations' are more voluminous" during the afternoon than at other times (explanations of these terms and which Petitioners fit the description are located at various places within both affidavits.) Finally, this affidavit stated that Petitioner PIRKLE remains in telephone contact with employees of the lottery during the day.

It is submitted that all of these facts, when read in light of the entire affidavits, established probable cause to believe that communications of the other Petitioners would be intercepted, requiring their being named in

the application and order as persons known whose communications were to be intercepted.

REASON FOR GRANTING THE WRIT

I.

THE GOVERNMENT FAILED TO IDENTIFY IN THE WIRETAP APPLICATION PERSONS WHO THE GOVERNMENT HAD PROBABLE CAUSE TO BELIEVE WERE COMMITTING THE OFFENSE AND WHOSE COMMUNICATIONS WERE TO BE INTERCEPTED; SUCH FAILURE TO SO IDENTIFY REQUIRES SUPPRESSION OF THE SEIZED CONVERSATIONS.

Title 18, United States Code, Section 2518(1)(b)(iv) has been interpreted by this Court in *United States v. Kahn,* 415 U.S. 143 (1974). This Court stated, at 415 U.S. 155:

> "We conclude, therefore, that Title III requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cause to believe that the individual is 'committing the offense' for which the wiretap is sought."

This Court, in *United States v. Giordano,* 416 U.S. 505 (1974), held, at page 527:

> "We think Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the Congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device."

In *United States v. Chavez*, 416 U.S. 562, 574, 575 (1974), this Court stated:

> "We did not go so far as to suggest that every failure to comply fully with any requirement provided in Title III would render the interception of wire or oral communications 'unlawful' . . . suppression is not mandated for each violation of Title III, but only if "disclosure' of the contents of the intercepted communications, or derivative evidence, would be in violation of Title III."

And, at page 580, this Court held:

> "Though we deem this result to be the correct one under the suppression provisions of Title III, we also deem it appropriate to suggest that strict adherence by the Government to the provisions of Title III would nonetheless be more in keeping with the responsibilities Congress has imposed upon it when authority to engage in wiretapping or electronic surveillance is sought."

Title 18, U.S.C. § 2518(1)(b)(iv) requires that when the Government applies for a wiretap authorization, the "identity of the person, if known, committing the offense and whose communications are to be intercepted" must be disclosed.

There can be no doubt in this case that Petitioners DONALD WELDON IVEY, MARSHALL PYRON, JR. and CHARLES CLEON ANDERSON were "known." In fact the Government in its brief to the Fifth Circuit admitted that "probable cause to believe" that these three individuals were persons engaged in the unlawful lottery existed. Neither can there be any doubt that this same probable cause existed that these three would be intercepted over the telephone line for which the wiretap was sought.

The decision rendered by the United States Court of Appeals for the Fifth Circuit in this case conflicts with decisions in three other Courts of Appeal. *United States v. Bernstein*, 509 F.2d 966 (4th Cir., 1975) *cert. pending*, No. 74-1486, filed 5/27/75; *United States v. Donovan*, 513 F.2d 337 (6th Cir., 1975) *cert. granted*, No. 75-212; *United States v. Moore*, 513 F.2d 485 (D.C. Cir., 1975) petition for rehearing *en banc* pending.

In *United States v. Bernstein, supra*, the Court held in dealing with this section of Title III:

> "We conclude from the unequivocal language of Title III that Congress intended any unlawful invasion of an aggrieved person's privacy to be sufficient harm in itself to require suppression. " 'prejudice is not an element of the definition' " [of an aggrieved person]. 509 F.2d at 1004.

The Court in *United States v. Donovan, supra*, stated:

> "Since Congress has imposed a clear requirement that the identity of the participants must be disclosed 'if known,' we are not concerned with the reason that these names were omitted from the application. In our view it makes no difference whether the omission was inadvertent or purposeful. The fact of omission is sufficient to invoke suppression." 513 F.2d at 341.

Petitioners herein contend that review by this Court is presently necessary to resolve the established conflict among the Circuits.

CONCLUSION

For the foregoing reason, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully Submitted:

OSCAR B. GOODMAN, ESQ.
Goodman and Snyder
230 Las Vegas Blvd. South
Las Vegas, Nevada 89101
Telephone: (702) 384-5563

Attorney for Petitioner:
CHARLES CLEON ANDERSON

H.A. STEPHENS, JR., ESQ.
CHARLES R. SMITH, ESQ.
Smith & Smith
2334 National Bank of
Georgia Building
34 Peachtree Street
Atlanta, Georgia 30303

Attorneys for Petitioners:
DONALD WELDON IVEY, GORDON MAJOR PIRKLE and MARSHALL PYRON, JR.

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75-2267
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

DONALD WELDON IVEY, GORDON MAJOR PIRKLE, MARSHALL PYRON, JR., and CHARLES CLEON ANDERSON,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Georgia

(March 16, 1976)

BEFORE BROWN, Chief Judge, GODBOLD and GEE, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

*Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409. Part I.

[1] See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.